No. 13342

United States
Court of Appeals
for the Ninth Circuit.

RALPH G. LEMKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Supplemental
Transcript of Record

Appeal from the District Court
for the District of Alaska,
Fourth Division

In the District Court for the District of Alaska,
Fourth Division

General June, 1951, Term Monday, March 10, 1952

98th Court Day

Court convened pursuant to adjournment at 1:45 p.m., Honorable Harry E. Pratt, District Judge, present and presiding. Also present were Everett W. Hepp, United States Attorney, and John B. Hall, Clerk. The following proceedings were had, to wit:

No. 1578 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RALPH G. LEMKE,

Defendant.

SENTENCE

Came Everett W. Hepp, U. S. Attorney, representing the Government; came the defendant in person and represented by Julien A. Hurley.

This being the time set for the passing of sentence in this cause, the Court asked Mr. Hepp, Mr. Hurley, and the defendant if either had anything to say.

Mr. Hepp and Mr. Hurley presented statements to the Court.

The Court announced that the sentence would be confinement in the U. S. Jail at Fairbanks, Alaska, for the period of six (6) months.

The Court stated that the amount of the Stay Bond in this cause would be Two Thousand Dollars ($2,000.00), and that the present bond of One Thousand Dollars be continued until 2:00 p.m., Wednesday, March 12, 1952, at which the Stay Bond must be filed.

Acceptance of service of the Certified Copy of Sentence is hereby admitted by receipt of a copy thereof.

/s/ R. J. McNEALY,
United States Attorney, Fourth Judicial Division,
Territory of Alaska.

In the District Court of the District of Alaska,
Fourth Judicial Division

CERTIFICATE

United States of America,
District of Alaska, Fourth Judicial Division—ss.

I, John B. Hall, Clerk of the District Court of the District of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached one page(s) of typewritten matter, constitute(s) a full, true, and complete copy, and the whole thereof, of the sentence in cause No. 1587 Cr., entitled, United States of America, Plaintiff, vs. Ralph G. Lemke, Defendant.

In Witness Whereof I have hereunto set my

hand and the seal of the above-entitled Court this 20th day of April, 1953.

[Seal] JOHN B. HALL,
Clerk.

By /s/ AUDREY E. WARFIELD,
Deputy.

AFFIDAVIT

United States of America,
Fourth Judicial Division,
Territory of Alaska.

Julien A. Hurley, being first duly sworn, upon oath deposes and says:

That on the 10th day of March, 1952, sentence was imposed upon Ralph G. Lemke, Defendant, in Case No. 1578 Criminal, entitled United States of America, Plaintiff, vs. Ralph G. Lemke, Defendant.

That after sentence was passed and in the presence of the Court and the United States Attorney, I gave Notice of Appeal in open Court and asked the Judge to fix the amount of a stay bond and told him that I would file the Notice of Appeal and Undertaking as soon as I could prepare them.

That the Court gave me until 2 p.m. Wednesday, March 12, 1952, in which to file the bond and I assumed that the judgment had been entered on the day sentence was imposed and I am of the opinion that the Court, when he approved the bond, was under the impression that the judgment had been entered.

That the Defendant was then released under the pending bond until 2 o'clock p.m., March 12, 1952.

/s/ JULIEN A. HURLEY.

Subscribed and sworn to before me this 22nd day of April, 1953.

[Seal] /s/ E. P. McCARRON,
Notary Public in and for the
Territory of Alaska.

My commission expires 4/5/'56.

Acceptance of service of the foregoing Affidavit is hereby admitted by receipt of a copy thereof.

/s/ R. J. McNEALY,
United States Attorney.

Received April 24, 1953.

PAUL P. O'BRIEN,
Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK AS TO DOCKET ENTRIES

I, John B. Hall, Clerk of the District Court, Fourth Judicial Division, Alaska, do hereby certify that the following list comprises all docket entries in the above-entitled cause, to wit:

1952

Jan. 7—File Indictment, A True Bill.

Feb. 13—Issue Bench Warrant.

1952

Feb. 14—File Bench Warrant, served, bail at $1,000.00.

Feb. 18—File Arraignment and Setting Time to plead, 43/77.

Feb. 19—File Motion to dismiss.

Feb. 20—File Praecipe for Subpoena—Govt. (5)

Feb. 20—Issue Subpoenas—Govt. (5).

Feb. 19—File and enter Order, Plea, and Setting for Trial, 43/80.

Feb. 26—File and enter Trial by Jury, 43/90.

Feb. 26—File and enter Trial by Jury (Cont.), 43/91.

Feb. 27—File and enter Trial by Jury (Cont.), 43/92-93 (2).

Feb. 27—File and enter Verdict, No. 2, 43/93.

Feb. 27—File Instructions to the Jury.

Feb. 27—File Pltf.'s Instruction No. 1.

Feb. 27—File Instructions requested by Defdt.

Mar. 7—File and enter Time for Sentence, 43/110.

Mar. 10—File and enter Sentence, 43/114 (6 mos. Fed. Jail).

Mar. 11—File Notice of Appeal.

Mar. 12—File Undertaking on Appeal on Admission to Bail.

Mar. 14—File and enter Judgment and Commitment (6 mos.), 43/125.

Mar. 14—Issue 2 ctfd. copies of above to U. S. Marshal.

Apr. 8—File Cost Bill, $34.50.

Apr. 10—File Praecipe for Transcript of Record.

The above is submitted as a supplemental record per an order from the Appellate Court dated March 11, 1953.

Witness my hand and the seal of this Court this 14th day of March, 1953.

Attest:

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 13,342. United States Court of Appeals for the Ninth Circuit. Ralph C. Lemke, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed March 19, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 13342

United States
Court of Appeals
For the Ninth Circuit

RALPH G. LEMKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the District Court
for the District of Alaska,
Fourth Division**

**Proceedings Had in the United States Court of Appeals
for the Ninth Circuit**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Tuesday, January 27, 1953.

Before: Mathews, Bone and Pope,
Circuit Judges.

ORDER SUBMITTING CAUSE

This cause coming on regularly for hearing or submission, and there being no appearance in open Court on behalf of appellant, on motion of Mr. Robert J. McNealy, United States Attorney, counsel for appellee, Ordered appeal herein submitted to the Court for consideration and decision on briefs on file.

United States Court of Appeals
for the Ninth Circuit
No. 13,342

RALPH G. LEMKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER

The Clerk of the District Court for the Territory of Alaska, Fourth Division, is hereby ordered to certify and transmit to the clerk of this Court a

supplemental record on appeal in this case (No. 1578 in the District Court). The supplemental record shall contain:

1. The original or a copy of all docket entries relating to this case. Such original or copy shall clearly indicate the date on which each such docket entry was made.

2. The original or a copy of the court reporter's transcript of all proceedings had in this case after February 27, 1952.

3. The original or a copy of all orders signed by the District Judge and filed in this case before March 14, 1952, with endorsements showing the date of filing each such order. If there was no such order, the clerk of the District Court shall so state.

4. The original or a copy of all judgments signed by the District Judge and filed in this case before March 15, 1952, with endorsements showing the date of filing each such judgment. If there was no such judgment, the clerk of the District Court shall so state.

Upon the filing of the supplemental record with the clerk of this Court, this case shall be deemed submitted to this Court. The submission thereof on February 27, 1953, is hereby vacated.

/s/ CLIFTON MATHEWS,
/s/ HOMER T. BONE,
/s/ WALTER L. POPE,
United States Circuit Judges.

United States Court of Appeals
for the Ninth Circuit

No. 13,342

RALPH G. LEMKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

March 31, 1953

Appeal from the District Court for the Territory of Alaska, Fourth Division

Before: Mathews, Bone and Pope,
Circuit Judges.

PER CURIAM

Appellant, Ralph G. Lemke, was indicted for violating Alaska Compiled Laws Annotated, 1949, § 65-5-81, was arraigned, pleaded not guilty, was tried and, on February 27, 1952, was found guilty. A judgment sentencing appellant was entered on March 14, 1952. From that judgment—the only judgment entered in the case—no appeal was taken. However, on March 11, 1952, three days before the judgment was entered, appellant took what purported to be an appeal from a judgment entered on March 10, 1952. There was no such judgment. Therefore the appeal is dismissed. Cf. Prickett v. Consolidated Liquidating Corp., 9 Cir., 180 F. 2d 8.

Pope, Circuit Judge, dissenting:

The judgment here discloses that on March 10, 1952, defendant appeared with his counsel for sentence. It is apparent that at that time sentence was pronounced, to commence on that date.[1] However, the judgment was not signed, dated or entered until March 14. It follows from Criminal Rule 32(b) that the notice of appeal, filed March 11, was premature.

But the notice was still on file on March 14, and there is no doubt or uncertainty as to what sentence, or judgment, it was intended to reach. For reasons similar to those suggested in Luckenbach SS. Co. v. United States, 272 U. S. 533, I think we should hold that the notice of appeal, though premature, was not a nullity. See the dictum in Richards v. United States, D.C. cir., 192 F. 2d 602, 604. I think the defect and irregularity here is of the sort we are required to disregard by Criminal Rule 52(a).

[Endorsed]: Opinion and Dissenting Opinion. Filed March 31, 1953. Paul P. O'Brien, Clerk.

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[1]The judgment reads in part: "On this 10th day of March, 1952, came the Attorney for the Government and the defendant appeared in person and by counsel; It Is Adjudged that the defendant has been convicted on a verdict of guilty. * * * It Is Adjudged: That the defendant is guilty as charged * * * and that he be confined in the Federal Jail at Fairbanks, Alaska, for a period of six (6) months, such sentence to commence on the 10th day of March, 1952: * * *"

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Thursday, March 19, 1953.

Before: Mathews, Bone and Pope,
Circuit Judges.

ORDER RESUBMITTING CAUSE

The certified supplemental transcript of record having been filed, It Is Ordered that this cause be resubmitted to the Court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Tuesday, March 31, 1953.

Before: Mathews, Bone and Pope,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

United States Court of Appeals
for the Ninth Circuit

No. 13,342

RALPH G. LEMKE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Appeal from the District Court for the Territory of Alaska, Fourth Division.

This Cause came on to be heard on the Transcript of the Record from the District Court for the Territory of Alaska, Fourth Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the appeal in this Cause be, and hereby is dismissed.

Filed and entered March 31, 1953.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Thursday, May 14, 1953.

Before: Mathews, Bone and Pope,
Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of Mathews and Bone, Circuit Judges, It Is Ordered that the petition of appellant, filed April 28, 1953, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 133 pages, numbered from and including 1 to and including 133, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of June, 1953.

[Seal] PAUL P. O'BRIEN,
Clerk.